No. 80-1803

JUN 1
ALEXANDER L.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

BARRY G. TEDESCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

SIDNEY M. GLAZER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioner was properly prosecuted in the District of Massachusetts for endeavoring to obstruct justice in a criminal case pending in that district, when his culpable acts occurred outside that district.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Armour Packing Co. v. *United States*, 209 U.S. 56 ..... 3, 4

Johnson v. *United States*, 351 U.S. 215 3

Nye v. *United States*, 313 U.S. 33 ..... 4, 5

Strassheim v. *Daily*, 221 U.S. 280 ..... 4, 6

Travis v. *United States*, 364 U.S. 631 ..... 4, 5

United States v. *Anderson*, 328 U.S. 699 4

United States v. *Brothman*, 191 F. 2d 70 7

United States v. *Cameron*, 460 F. 2d 1394 7

United States v. *Floyd*, 228 F. 2d 913, cert. denied, 351 U.S. 938 7

United States v. *Nadolny*, 601 F. 2d 940 7

United States v. *O'Donnell*, 510 F. 2d 1190, cert. denied, 421 U.S. 1001 ..... 3, 4, 6

United States v. *Swann*, 441 F. 2d 1053 ..... 6, 7

PRECEDING PAGE WAS BLANK

Page

Constitution, statutes and rule:

United States Constitution:

Article III, Section 2 3

Sixth Amendment 3

Act of Mar. 2, 1831, ch. 99, 4 Stat. 487 *et seq.* :

Section 1, 4 Stat. 487 ..... 4, 5

Section 2, 4 Stat. 488 ..... 4, 5

Act of June 25, 1948, ch. 645, 62 Stat. 683 *et seq.* 4

18 U.S.C. 1503 ..... 1, 4, 5, 6, 7

18 U.S.C. 1503 (Historical and Revision Note) 4

Hobbs Act, 18 U.S.C. 1951 7

18 U.S.C. 1001 5

18 U.S.C. 1510 7

18 U.S.C. 3237 4

Fed. R. Crim. P. 18 3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1803

BARRY G. TEDESCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-11A) is reported at 635 F. 2d 902.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1980. A petition for rehearing was denied on December 29, 1980 (Pet. App. 1B). The petition for a writ of certiorari was filed on April 29, 1981, and received by the Clerk as of February 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of endeavoring to obstruct justice in that court, in violation of 18 U.S.C. 1503. He was sentenced to imprisonment for a term of one year, with all but 90 days suspended in favor of two years' probation.

The indictment charged that petitioner endeavored to induce a witness, John Makris, not to testify fully and completely against a defendant, Benjamin De Magistris, in a criminal trial pending in the United States District Court for the District of Massachusetts. The evidence showed that petitioner, Makris, and De Magistris were independent contractors who transported mail by truck for the United States Postal Service. Makris complained about irregularities in the bidding for routes, and in May 1979 he testified before a grand jury in the District of Massachusetts, which ultimately indicted De Magistris for conspiracy and fraud (Pet. App. 2A-3A).

In late October or early November 1979 in Mount Vernon, New York, petitioner advised Makris that Makris had De Magistris "in a very good position" and that De Magistris "could do a lot" for Makris. On November 5, 1979, petitioner telephoned Makris at his home in Yonkers, New York, repeated these remarks, and suggested that Makris speak to De Magistris. When Makris refused, petitioner asked to meet with Makris. Makris then contacted a postal inspector (Pet. App. 3A).

On November 6, Makris's truck broke down. Makris called petitioner and asked to rent or borrow a truck. Petitioner arranged to meet with Makris on November 8 in Millville, New York. At this meeting petitioner told Makris that De Magistris could arrange to finance a truck for Makris without any down payment, subcontract the contract Makris had hoped to obtain, and supply trucks and drivers until Makris could afford them. Petitioner also suggested that Makris meet with De Magistris's attorney and review his testimony. Makris said that he would not perjure himself or change his testimony. Petitioner replied that De Magistris did not want him to perjure himself or change his testimony, "just if you have anything solid against him, you know, not to add any more wood to the

fire." Makris again called the postal inspector and on the following day recorded a telephone conversation with petitioner. In this conversation petitioner said that if Makris had solid information on De Magistris, he should "hold back on it" and again mentioned the subcontract (Pet. App. 3A-4A). On November 10, petitioner was arrested and advised of his *Miranda* rights. Petitioner first said that he had not contacted Makris concerning his testimony. The postal inspector then played the taped conversation, whereupon petitioner admitted that he attempted to have Makris alter his testimony and withhold damaging information (Pet. App. 4A-5A).

Petitioner's motion to dismiss the indictment for improper venue was denied. On appeal, petitioner again claimed that venue was improper.[1] The court of appeals, expressly following *United States* v. *O'Donnell*, 510 F. 2d 1190 (6th Cir.), cert. denied, 421 U.S. 1001 (1975), rejected this claim (Pet. App. 1A-2A, 6A-9A).

ARGUMENT

1. Article III, Section 2, of the Constitution and the Sixth Amendment give criminal defendants the right to be tried "in the State" and "district wherein the crime shall have been committed * * *."[2] But, at least within certain limits (see *Johnston* v. *United States*, 351 U.S. 215, 220-222 (1956); *Armour Packing Co.* v. *United States*, 209 U.S. 56, 76-77 (1908)), Congress, by its definition of the offense, establishes where the crime was committed; "[w]here Congress is not explicit, 'the *locus delicti* must be determined

---

[1] He also asserted that the evidence was insufficient to support his conviction. The court of appeals rejected this contention (Pet. App. 9A), and petitioner does not renew it here.

[2] In addition, Fed. R. Crim. P. 18 provides in part: "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed."

from the nature of the crime alleged and the location of the act or acts constituting it.' " *Travis* v. *United States*, 364 U.S. 631, 635 (1961), quoting *United States* v. *Anderson*, 328 U.S. 699, 703 (1946). Moreover, it is settled that "[t]he constitutional requirement is as to the locality of the offense and not the personal presence of the offender." *Armour Packing Co.* v. *United States, supra*, 209 U.S. at 76; see *Travis* v. *United States, supra*, 364 U.S. at 634; *Strassheim* v. *Daily*, 221 U.S. 280, 285 (1911).

Judged by these standards, the decision of the court of appeals was clearly correct.[3] As this Court has explained (*Nye* v. *United States*, 313 U.S. 33, 48-52 (1941)), the offenses described in 18 U.S.C. 1503 are, both traditionally and in Congress's view, akin to contempts of court. Section 1503 is derived from Section 2 of the Act of Mar. 2, 1831, ch. 99, 4 Stat. 488.[4] That Act was " 'declaratory of the law concerning contempts of court' " (*Nye* v. *United States, supra*, 313 U.S. at 46). Its purpose was "narrowly [to] confine[]" the "category of criminal cases which could be tried without a jury" (*id.* at 47). Section 1 permitted the summary punishment of, *inter alia*, contempts committed

---

[3]It is our position that petitioner could also have been tried in the jurisdiction in which his culpable acts occurred. See 18 U.S.C. 3237 ("Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be * * * prosecuted in any district in which such offense was begun, continued, or completed."). Apparently no court of appeals has rejected this position. See Pet. App. 7A-8A n.5; *United States* v. *O'Donnell, supra*, 510 F. 2d at 1193.

[4]Section 1503 was enacted as part of the codification of Title 18 and its enactment into law. Act of June 25, 1948, ch. 645, 62 Stat. 683, 769. The Historical and Revision Note to 18 U.S.C. 1503 recites that it is "[b]ased on title 18, U.S.C., 1940 ed., § 241 * * *." In *Nye* v. *United States, supra*, 313 U.S. at 46, this Court said that 18 U.S.C. 241 derives from Section 2 of the Act of Mar. 2, 1831. The similarities in language make the derivation clear in any event.

"in the presence of the * * * court[], or so near thereto as to obstruct the administration of justice"; by contrast, the offenses specified in Section 2 were to be tried by a jury (*ibid.*). But in Congress's view, the actions proscribed by Section 2—and now by 18 U.S.C. 1503—like those specified in Section 1, were affronts to the dignity of the court that "corrupt[] the judicial process and impede[] the administration of justice" (*Nye* v. *United States, supra*, 313 U.S. at 52). There is no indication that Congress, in providing procedural safeguards for the punishment of the offenses now described by Section 1503, intended to deprive federal courts of their traditional jurisdiction over contempts, and crimes comparable to contempts, committed against them.

Other decisions of this Court support the conclusion that the United States District Court for the District of Massachusetts was an appropriate venue for the trial of the charge against petitioner. In *Travis* v. *United States, supra*, the Court held that a trial for filing a false affidavit in a matter within the jurisdiction of a federal agency could be held in Washington, D.C., where the affidavit was filed, even though the affidavit was executed and mailed in Colorado and the defendant never left Colorado.[5] *Travis* therefore suggests that a defendant charged with taking an action calculated to interfere with the processes of an official body can be prosecuted in the jurisdiction where that body sits,

---

[5]This appears to have been the unanimous view of the Court. See 364 U.S. at 641 (Harlan, J., dissenting). The Court held that venue did not lie in Colorado. It reached this conclusion on the basis of a careful reading of the statute under which the defendants were prosecuted, 18 U.S.C. 1001, which prohibits only the making of false statements in a matter within the jurisdiction of an agency; the Court reasoned that the crime had not occurred until the filing was completed. See 364 U.S. at 635. The dissenters argued that venue lay in Colorado and intimated that it lay in the District of Columbia as well. See *id.* at 641.

even if the defendant does not physically enter that jurisdiction; by analogy, petitioner was properly prosecuted in Massachusetts. Similarly, in *Strassheim* v. *Daily, supra*, 221 U.S. at 285, the Court held that a state could punish a person who had defrauded the state and corrupted an official even if the defendant "never had set foot in the State until after the fraud was complete." In a passage that would apply equally to petitioner, Justice Holmes, speaking for the Court, said: "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect * * *" (*ibid.*).

2. Petitioner correctly asserts (Pet. 4-10) that the United States Court of Appeals for the District of Columbia Circuit has reached a result inconsistent with that of the court below. In *United States* v. *Swann*, 441 F. 2d 1053 (D.C. Cir. 1971), the defendant was charged with violating Section 1503 by injuring a witness on account of her having testified before a grand jury in the District of Columbia and by endeavoring to intimidate her in connection with a pending trial. All of the defendant's actions occurred in Maryland. The panel reversed the defendant's convictions, holding that venue lay only in Maryland. As both the court below and the Sixth Circuit, in *United States* v. *O'Donnell, supra*, 510 F. 2d at 1193-1194, noted, the panel opinion in *Swann* fails to recognize the connection between the offenses described in Section 1503 and contempts of court. In addition, the *Swann* panel relied on cases involving offenses in which an intended effect on specific proceedings in another district was not an element (441 F. 2d at 1055). This Court denied certiorari in *O'Donnell*, and we believe that the limited importance of the issue and the possibility

that the District of Columbia Circuit will not adhere to *Swann* continue to make review unwarranted.[6]

Petitioner also cites (Pet. 6-7, 8, 10) *United States* v. *Nadolny*, 601 F. 2d 940 (7th Cir. 1979), and *United States* v. *Brothman*, 191 F. 2d 70 (2d Cir. 1951). *Nadolny* dealt with a violation of 18 U.S.C. 1510, which prohibits the obstruction of a criminal investigation. Section 1510 can be violated even if no court proceeding has begun. See, *e.g.*, *United States* v. *Cameron*, 460 F. 2d 1394, 1400-1401 (5th Cir. 1972). Criminal investigations may not be centered in one district and may occur in several districts at the same time. Consequently, the offenses described by Section 1510 are not akin to contempts of court in the same fashion as those described by Section 1503. Moreover, the Seventh Circuit has held that a prosecution under the Hobbs Act, 18 U.S.C. 1951, for obstructing interstate commerce by extortion may be brought "in any jurisdiction where commerce is affected" even if all the culpable acts occurred outside that jurisdiction. *United States* v. *Floyd*, 228 F. 2d 913, 918 (7th Cir.), cert. denied, 351 U.S. 938 (1956). By analogy, the government should be free to prosecute a violation of Section 1503 in the jurisdiction of the proceeding it affects.

Brothman was a prosecution under the predecessor of Section 1503, and the court of appeals held that venue did not lie in the district where the proceeding was pending. But the government apparently asserted only that the defendant waived his objection to venue and did not argue that venue was proper (see 191 F. 2d at 72). Consequently, the court of appeals did not discuss the merits of the venue issue or the connection between Section 1503 and contempts of court.

---

[6]Since prosecutors confronting situations involving obstruction of District of Columbia proceedings are unlikely to lay charges in that district when such action would be contrary to the holding in *Swann*, there may in fact never be another case that reaches a result contrary to that in petitioner's case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

SIDNEY M. GLAZER
Attorney

JUNE 1981

DOJ-1981-06